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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**IN RE BANC OF CALIFORNIA
SECURITIES LITIGATION**

**SACV 17-00118 AG (DFMx)
consolidated with
SACV 17-00138 AG (DFMx)**

**DEFENDANT STEVEN A.
SUGARMAN'S NOTICE OF
MOTION AND MOTION TO
DISMISS THE CONSOLIDATED
AMENDED COMPLAINT, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Judge: Honorable Andrew J. Guilford
Date: August 14, 2017
Time: 10:00 a.m.
Place: Department 10D

ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on August 14, 2017, at 10:00 a.m., or at such
3 later date and time as the Court may order, in the Courtroom of the Honorable
4 Andrew J. Guilford, Courtroom 10D, United States District Court, Central District
5 of California, located at 411 West 4th Street, Santa Ana, California, defendant
6 Steven A. Sugarman will and hereby does move for an Order dismissing the
7 Consolidated Amended Complaint for Violation of the Federal Securities Laws
8 dated May 31, 2017 (the “Complaint” or “AC”). This Motion is made pursuant to
9 the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) and Federal
10 Rule of Civil Procedure 12(b)(6), on the grounds that the Amended Complaint fails
11 to state a claim upon which relief can be granted.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on June 23, 2017, and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Mark R. McDonald in Support of Defendants' Joint Request for Judicial Notice and for Incorporation of Documents by Reference ("McDonald Decl.") and exhibits thereto, the Complaint, the Court's record in this matter, the arguments of counsel, and any other materials that the Court may consider prior to its decision on this Motion. Mr. Sugarman also joins the legal arguments made in Defendant Banc of California Inc.'s Motion to Dismiss and the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

23 | Dated: June 30, 2017 LATHAM & WATKINS LLP

By: /s/ Andrew R. Gray
Manuel A. Abascal
Michele D. Johnson
Andrew R. Gray

Attorneys for Defendant Steven A.
Sugarman

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1 **I. INTRODUCTION**

2 Banc of California Inc. (“Banc”) is a financial institution with over \$10
 3 billion in assets. On October 18, 2016, an anonymous blogger posted an online
 4 article expressing various opinions that he/she said were based on research into
 5 publicly available information. Two of the key opinions were that: Banc
 6 executives and directors had ties with a fraudster named Jason Galanis; and one of
 7 the Banc’s directors may not be “independent” under New York Stock Exchange
 8 (“NYSE”) rules. AC ¶ 5; McDonald Decl. Ex. 12 at 3. The Banc’s stock price
 9 dropped. AC ¶ 7. A few hours later, the Banc issued a press release indicating that
 10 it previously conducted an internal investigation led by an outside law firm into
 11 Galanis’s ties to the Banc, and that the internal investigation concluded the
 12 blogger’s opinion about Galanis was wrong. *Id.* ¶ 8. A few months later, the Banc
 13 issued another press release indicating that a second outside law firm had
 14 conducted a follow-up investigation, which concluded: (a) the blogger’s opinion
 15 about Galanis was wrong, and (b) none of the directors violated any independence
 16 requirements. *Id.* ¶ 104; McDonald Decl. Ex. 4 at 1. By then, the stock price had
 17 recovered all of the value it had lost since the blogger issued his/her opinion. AC
 18 ¶¶ 7, 11.

19 Plaintiff is a stockholder who purports to have suffered losses following the
 20 blogger’s post. Plaintiff alleges three material omissions from the Banc’s public
 21 statements: (1) that Banc executives and directors, including CEO Steven A.
 22 Sugarman, had ties with Galanis; (2) that one of the Banc’s “disinterested
 23 directors” may not have been independent under NYSE rules; and (3) that the
 24 Banc’s management was in the midst of an internal investigation into the
 25 Company’s ties with Galanis. AC ¶ 4; *see also id.* ¶¶ 59, 72. Based on these
 26 alleged omissions, Plaintiff asserts claims under Sections 10(b) and 20(a) of the
 27 Securities and Exchange Act (the “Exchange Act”) and the SEC’s Rule 10b-5
 28 against Mr. Sugarman. AC ¶¶ 121-27.

1 Plaintiff's claims fail for several reasons. As stated by the Banc, the
 2 allegedly concealed information was all publicly available and thus not actionable.
 3 In addition, the Banc actually did disclose the facts that caused Plaintiff's claimed
 4 damages. The Banc's financial statements during the Class Period warned
 5 investors that the Banc faced "reputational risk" from "negative publicity" that
 6 could be generated "with or without merit" and could cause harm to investors. AC
 7 ¶ 58. This is precisely what caused the Plaintiff's harm as alleged in the
 8 Complaint. Apparently anticipating this issue, Plaintiff alleges that this disclosure
 9 was insufficient because the Banc should have disclosed more details regarding
 10 Galanis's alleged financial ties to Banc executives. *Id.* ¶ 59. The alleged lack of
 11 detail, however, did not render the risk factor inaccurate, and thus the alleged
 12 omission is not actionable. Moreover, it is not required, nor is it even possible, for
 13 the Banc to predict and disclose with specificity what facts an anonymous blogger
 14 may use to publish incorrect opinions. Because the material facts regarding the
 15 risk of false publicity were disclosed, Plaintiff's fraud-by-omission claim fails.

16 Plaintiff's claim that a Banc director violated NYSE rules also fails to state a
 17 claim because Plaintiff fails to allege that the purported violation caused any
 18 damages. To bring a securities fraud claim, Plaintiff must allege a material false
 19 statement that caused damages when the alleged "truth" was revealed to the
 20 market. Here, Plaintiff fails to allege that the market was ever told that a Banc
 21 director violated NYSE independence rules. On the contrary, Plaintiff cites to
 22 public Company statements disclosing that the second law firm's investigation
 23 concluded that the director did not violate any independence rules. AC ¶ 104;
 24 McDonald Decl. Ex. 4 at 1. Thus, Plaintiff could not have been harmed by the
 25 alleged violation because (a) there was no actual violation, and (b) even if there
 26 was one, the violation was never disclosed to the markets and therefore could not
 27 have caused the stock to drop.

28

1 The Complaint also is deficient because it does not allege that Mr. Sugarman
 2 was involved in the decisions relating to the Company's disclosures or relating to
 3 Galanis. For these and other reasons, the Complaint fails to allege scienter on the
 4 part of Mr. Sugarman, as well as failing to allege loss causation.

5 In short, Plaintiff suffered losses because the market briefly believed the
 6 incorrect views of an anonymous blogger who was shorting the stock. Plaintiff
 7 cannot point to any actionable false statement or omission of fact that would make
 8 Defendant Steven Sugarman, or any other Defendant, liable for Plaintiff's losses.

9 **II. BACKGROUND CONCERNING STEVEN SUGARMAN**

10 Although the Court must assume the facts alleged to be true, Mr. Sugarman
 11 does not concede that any of the alleged facts in the Complaint, or any facts
 12 alleged in any brief submitted by any other party, are true. Defendant Steven
 13 Sugarman served as the Banc's Chairman, President, and CEO until January 23,
 14 2017. AC ¶ 20. During Mr. Sugarman's tenure as CEO of Banc, the Company
 15 experienced remarkable and sustained growth. None of the relevant financial
 16 results has ever been restated, and Plaintiff does not challenge any of them as false.
 17 The Complaint contains no allegation that Mr. Sugarman drafted any of the
 18 statements at issue, nor does it contain any particularized allegation that Mr.
 19 Sugarman was aware of any alleged false statements or omissions.

20 **III. ARGUMENT**

21 **A. Plaintiff Has Failed To Plead An Actionable Omission With
 22 Respect To Ties With Jason Galanis**

23 As noted by the Banc, the anonymous blogger's report was derived from
 24 research into publicly available information, and a securities fraud case cannot be
 25 based on the failure to disclose publicly available information. *See* Defendant
 26 Banc of California's Notice of Motion and Motion to Dismiss the Consolidated
 27 Amended Complaint, and Memorandum of Points and Authorities in Support
 28 Thereof ("Banc's Motion") at Section II.A.3. Plaintiff's theory, however, suffers

1 from two other significant flaws: (a) the Banc actually disclosed the risk presented
 2 by the blog posting, and (b) the Banc did not have a duty to make any further
 3 disclosure regarding Galanis.

4 **1. The Banc Disclosed The Risk Associated With The**
 5 **Anonymous Blog**

6 Plaintiff cannot proceed on a securities fraud claim where the risks that
 7 Plaintiff claims were hidden were actually disclosed. *See In re Cutera Sec. Litig.*,
 8 610 F.3d 1103, 1112 (9th Cir. 2010) (affirming dismissal as to sales statements
 9 where company warned that “ability to continue increasing sales performance
 10 worldwide” could cause variance in results”); *Kovtun v. VIVUS, Inc.*, No. C 10-
 11 4957, 2012 WL 4477647, *12 (N.D. Cal. Sept. 27, 2012) (dismissing claims where
 12 “risk factors” were “devoted to the very risks that plaintiff claims were hidden”).

13 As Plaintiff’s own allegations make clear, Defendants consistently disclosed
 14 the risk that the Company may face reputational harm from negative publicity
 15 based on incorrect facts. In each of the challenged annual and quarterly filings,
 16 Defendants explicitly warned investors as follows:

17 **Managing reputational risk is important to attracting**
 18 **and maintaining customers, investors and employees.**

19 Threats to our reputation can come from many sources,
 20 including adverse sentiment about financial institutions
 21 generally, unethical practices, employee misconduct,
 22 failure to deliver minimum standards of service or
 23 quality, compliance deficiencies and questionable or
 24 fraudulent activities of our customers. We have policies
 25 and procedures in place to promote ethical conduct and
 26 protect our reputation. However, these policies and
 27 procedures may not be fully effective. Negative publicity
 28 regarding our business, employees, or customers, with or
 without merit, may result in the loss of customers,
 investors and employees, costly litigation, a decline in
 revenues and increased government oversight.

AC ¶¶ 58, 64. The Banc incorporated this risk factor into all of its quarterly
 filings. *Id.*

Plaintiff’s alleged injury arises from this disclosed risk. The anonymous

1 blogger created “reputational risk” by publishing “negative publicity” that sought
 2 to create “adverse sentiment” about allegedly “unethical practices, employee
 3 misconduct . . . , compliance deficiencies.” The risk factor even warns that such
 4 negative publicity may harm the Company even if it is ultimately “without merit,”
 5 as was the case here. Indeed, the blogger’s thesis—“this introduces a significant
 6 undiscounted risk that notorious criminals gained control over the \$10 Billion
 7 taxpayer guaranteed Banc of California,” making it “un-investible”—is grounded
 8 in the very “reputational risk” addressed in the risk factor. AC ¶ 84.

9 **2. The Banc Had No Duty To Provide Any Further Disclosure**
 10 **Regarding The Ties With Galanis**

11 Plaintiff argues that the risk factor is insufficient because it omitted the
 12 specific risk posed by potential negative publicity regarding Galanis. Section
 13 10(b) and Rule 10b-5, however, provide liability for omission of information only
 14 when there is a duty to disclose the allegedly omitted information. “Absent a duty
 15 to disclose, an omission, even with respect to information that a reasonable
 16 investor might find material, is not misleading.” *Greenberg v. Cooper Cos., Inc.*,
 17 No. 11-cv-5697, 2013 U.S. Dist. LEXIS 2944, *37 (N.D. Cal. Jan. 7, 2013).

18 A duty to disclose arises if a statement is made, and the omitted information
 19 relates to the same topic and the omission renders the statement made to be
 20 misleading. *See Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir.
 21 2002) (omission is actionable if statement “affirmatively create[s] an impression of
 22 a state of affairs that differs in a material way from the one that actually exists”); *In*
 23 *re Gap Sec. Litig.*, No. 89-16098, 1991 WL 17091, at *2 (9th Cir. Feb. 8, 1991)
 24 (no duty to disclose where company did not make “an affirmative statement on the
 25 same subject which would be misleading absent disclosure of the information”);
 26 *see also McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002)
 27 (duty to disclose only arises where statement made is material and “omitted fact is
 28 material to the statement in that it alters the meaning of the statement”).

1 Here, Plaintiff does not allege, much less with the particularity required by
 2 the PSLRA, how any statement by the Banc or Mr. Sugarman was rendered
 3 misleading by not disclosing the ostensible Galanis ties. If Plaintiff's theory is that
 4 the reputational risk disclosure is rendered misleading because the alleged Galanis
 5 ties were omitted, this theory cannot be sustained. Courts allow, and regulations
 6 require, that risk factors be "concise," and neither requires companies to predict
 7 every variation of facts that may be material to investors. *See, e.g., In re UBS AG*
 8 *Secs. Litig.*, No. 07 Civ. 11225, 2012 U.S. Dist. LEXIS 141449, at *96-98
 9 (S.D.N.Y. Sept. 28, 2012) (holding that the required "concise" risk factor
 10 statements need identify only the risk, not every fact underlying that risk). Indeed,
 11 the Supreme Court has noted that courts should not impose an overwhelming
 12 reporting burden that would make the resultant disclosures so vast and speculative
 13 as to be meaningless. *TSC Indus. v. Northway*, 426 U.S. 438, 448 (1976) (the
 14 standard for materiality should not be unnecessarily low because it would cause
 15 corporations to "bury the shareholders in an avalanche of trivial information"); *see also Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-*
 16 *Packard Co.*, 845 F.3d 1268, 1277 (9th Cir. 2017) (same).

18 The Banc's warning is appropriate here. The Banc could not realistically
 19 disclose with specificity every instance of potential meritorious or unmeritorious
 20 alleged misconduct that could be misused by a blogger to provide an incorrect
 21 negative opinion about the Banc. The Banc has over \$10 billion in assets, along
 22 with tens of thousands of clients and account holders. *See AC ¶¶ 26, 73.* Like
 23 other banks, it regularly reviews, inspects, and investigates its clients and
 24 transactions for many issues, including suspicious activities that are required by
 25 law to be reported to regulators. *See 12 C.F.R. 21.11* (requiring national banks to
 26 file Suspicious Activity Reports). Under Plaintiff's proposed omission theory, the
 27 Banc must disclose with specificity (a) every relationship that senior Banc
 28 executives have with any person who could be the subject of any negative opinion,

1 with or without merit, and (b) every actual or potential banking relationship that,
 2 with or without merit, could be mis-used by an anonymous blogger to harm the
 3 Banc's reputation. Such a standard is untenable.

4 In short, the reputational risk disclosure is not misleading due to the
 5 omission of the Galanis information, and Plaintiff cannot identify any other duty
 6 that Defendants had to disclose the alleged Galanis ties.

7 **B. Plaintiff Fails To Allege An Actionable Misstatement Regarding
 8 Director Independence**

9 Plaintiff's allegation that Defendants misled investors about the
 10 independence of the Banc's directors also fails. *See AC ¶ 4.* Plaintiff claims that
 11 the Banc violated an unspecified NYSE requirement because independent director
 12 Chad Brownstein had undisclosed financial relationships with Mr. Sugarman. *Id.*
 13 ¶¶ 39-46. In a footnote, Plaintiff also suggests that another director lacked
 14 independence because of his prior employment with an investment banking firm
 15 that served as an underwriter for Banc offerings, though it is unclear whether this
 16 theory is part of Plaintiff's allegations of securities fraud. *Id.* ¶ 101 n.4. These
 17 allegations cannot state a claim for securities fraud because they: (a) lack the
 18 required specificity, and (b) fail to allege loss causation, *i.e.*, particularized facts
 19 showing that the alleged violation was revealed to the market and caused harm.

20 Plaintiff fails to allege with particularity which NYSE listing requirement
 21 was purportedly violated. *Id.* ¶¶ 55-57, 59(b). Plaintiff also fails to identify any
 22 false statement made regarding Mr. Brownstein's independence or compliance
 23 with listing standards. *Id.*; *see In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869,
 24 877 (9th Cir. 2012) (requiring plaintiffs to "specify each statement alleged to have
 25 been misleading") (quoting 15 U.S.C. § 78u-4(b)(1)). Instead, Plaintiff appears to
 26 rely upon an omission theory—that the alleged "ties" between Browstein and
 27 Sugarman were undisclosed and violated the NYSE listing standard for an
 28 independent director. AC ¶ 46 ("Defendants knew but failed to disclose that

1 because of Brownstein’s financial ties with Sugarman, he did not meet the NYSE
 2 listing standards for director independence”).

3 This omission theory fails for the same reason as Plaintiff’s other claims;
 4 specifically, the “material ties” that Plaintiff alleges were not disclosed were all
 5 based exclusively on publicly available information, rendering them not actionable.
 6 *See supra* Section I.A.; Banc’s Motion at Section II.A.3. As to the other director
 7 mentioned in the footnote, there is no allegation whatsoever about Mr. Sugarman’s
 8 involvement in disclosures regarding such director, or his views regarding that
 9 director.

10 Most importantly, Plaintiff fails to allege that the “truth” regarding the
 11 alleged NYSE violations was disclosed to the market and caused any drop in the
 12 stock price. To plead a securities fraud claim, the Complaint must “state with
 13 particularity the circumstances constituting” loss causation, *i.e.*, how the alleged
 14 false statement caused Plaintiff’s losses. *Or. Pub. Emps. Ret. Fund v. Apollo Grp.*,
 15 774 F.3d 598, 605 (9th Cir. 2014). The Complaint nowhere alleges that the NYSE
 16 violation was revealed to the public; on the contrary, the Complaint incorporates
 17 press releases that confirm the opposite—that Mr. Brownstein was in compliance
 18 with NYSE listing standards. AC ¶ 104 (citing the Banc’s February 9, 2017
 19 disclosure, which stated that the WilmerHale investigation “did not find that any
 20 loan, related party transaction, or any other circumstance had impaired the
 21 independence of any director”). An alleged violation of the NYSE rules could not
 22 have caused the stock to drop if (a) the market was never made aware of the
 23 violation and (b) in fact, there was no violation.

24 **C. Plaintiff Has Failed To Plead Scienter As To Mr. Sugarman**

25 As explained in Section III of the Banc’s brief (Banc’s Motion at Section
 26 III), Plaintiff has not met the exacting requirements to plead scienter as to Mr.
 27 Sugarman. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313
 28 (2007). Plaintiff’s Complaint fails to meet this standard as to Mr. Sugarman for

1 the following additional reasons.

2 The Complaint presents no evidence that Mr. Sugarman could have
 3 anticipated that an anonymous blogger would misconstrue certain events to opine
 4 incorrectly that Galanis controls the Banc. Even the anonymous author expressly
 5 conceded that he/she didn't know the full facts—the blogger makes “no
 6 representation as to the accuracy or completeness of the information set forth in
 7 th[e] article.” McDonald Decl. Ex. 12 at 2; *see ScripsAmerica, Inc. v. Ironridge*
 8 *Global LLC*, 119 F. Supp. 3d 1213, 1261 (C.D. Cal. 2015) (“[W]ith regard to
 9 anonymous internet postings, it is [plaintiff’s] burden to plead reliability and
 10 knowledge that are indicative of scienter[.]”).

11 Plaintiff also does not allege that Mr. Sugarman was involved with the
 12 Banc’s internal investigation. *See generally* AC. If that investigation should have
 13 been disclosed to investors, Plaintiff fails to allege any facts as to why that failure
 14 should be ascribed to Mr. Sugarman, and not to any of the directors or
 15 management members involved in the investigation. *Cf. In re Daou Sys. Inc.*, 411
 16 F.3d 1006, 1022-24 (9th Cir. 2005) (dismissing claims against defendants who
 17 were “less heavily involved in the details and personally directing” the statements).

18 Mr. Sugarman’s lack of trading also belies any inference of scienter. Unlike
 19 the short-selling blogger, who admitted to shorting the stock and thus profited from
 20 the false rumors, there is no allegation that Mr. Sugarman sold stock during the
 21 class period, undermining any inference of his scienter. *See City of Roseville*
 22 *Emps. Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1137 n.24 (E.D.
 23 Wash. 2013) (“[C]ompensat[ion] by stock awards tends to negate an inference of
 24 scienter [where defendants] were subject to the same large losses as the investors
 25 they allegedly defrauded[.]”), *aff’d*, No. 14-35902, 2017 WL 2241820 (9th Cir.
 26 May 22, 2017); *Monk v. Johnson & Johnson*, No. 10-4841, 2011 WL 6339824, at
 27 *12 n.12 (D.N.J. Dec. 19, 2011) (accumulation of stock “raises a compelling
 28 inference against scienter”).

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Complaint should be dismissed.

3 Dated: June 30, 2017

4 LATHAM & WATKINS LLP

5 By: /s/ Andrew R. Gray

6 Manuel A. Abascal
7 Michele D. Johnson
7 Andrew R. Gray

8 Attorneys for Defendant Steven A.
9 Sugarman

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